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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant

BRIEF OF THE STATE OF UTAH IN OPPOSITION TO MOTION BY MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE AND ANSWER

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BRIEF OF THE STATE OF UTAH IN OPPOSITION TO MOTION BY MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE AND ANSWER

This brief is submitted by the State of Utah in opposition to the motion by Morton International, Inc., (hereinafter referred to as "Morton") to intervene as a defendant and answer the complaint of the State of Utah. It is submitted that the motion by Morton is not well founded and should be denied for the reasons set forth in this brief.

SUMMARY OF ARGUMENT

While Morton's motion to intervene is expressly bottomed on its view that it is an indispensable party to any adjudication in this action, it must be assumed that the effort to intervene essentially is brought under Rule 24(a)(2), revised July 1, 1966. That subdivision of Rule 24 relates to intervention as a matter of right in circumstances such as those claimed by Morton. Thus, Rule 24, rather than Rule 19, is the vehicle for intervention.

Any question with respect to the absence of an indispensable party in violation of Rule 19 is to be raised by the defendant or by the court *sua sponte*—not by an indispensable party. If raised by the defendant, the procedure is pursuant to Rule 12. There the absence of an indispensable party may be set up by way of defense in the answer, or may be asserted by motion under subsection (b)(7). Rule 12(h) also provides that such defense is not waived by a failure to raise the same in the answer or by motion, but may be raised subsequently, even at the time of trial on the merits.

Intervention, on the other hand, which must be pursuant to Rule 24(a)(2), requires that the person seeking to intervene must file his motion timely, must show that he has or claims rights which will be impaired or impeded by the disposition of the action without his presence, and must show that he is not adequately represented. Some significant differences apparently existed prior to July 1, 1966, between the criteria used to determine intervention as a matter of right under

Rule 24 and the defense of failure to join as a party a person who would be indispensable under Rule 19. But the 1966 revision of the rules specifically revised Rules 12, 19 and 24 so far as they pertain to the issues at hand. While there still are important differences in many respects, it appears that no crucial distinction now exists between the criteria for determining indispensability and intervention as a matter of right, at least to the extent that such criteria must be applied in this proceeding. This is so because the State of Utah admits that Morton has filed its motion timely, and further admits that Morton's claimed interest is not being represented directly by either Utah or the United States. The only issue disputed by Utah is whether the present action will impair or impede Morton's ability to protect its interest.

The issue as to intervention as a matter of right, as thus narrowed for purposes of this proceeding, is essentially the same as the issue of indispensability. Thus, if Morton is entitled to intervene as a matter of right, for all practical purposes it is indispensable; and if Morton is indispensable, then for all practical purposes it is entitled to intervene as a matter of right. Since July 1, 1966, the criteria for either determination are pretty much interchangeable.

However, it will be shown in this brief that the criteria to be used by the court, with respect either to intervention as a matter of right or in determining indispensability, are strictly practical considerations which are viewed in light of the facts of each particular case. Properly applied, such an evaluation and deter-

mination wholly within the sound discretion of the court should not permit intervention by Morton.

POINT I.

THE STATE OF UTAH HAS NOT CONSENTED TO SUIT BY MORTON IN THE PRESENT LITIGATION.

The Eleventh Amendment to the United States Constitution provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Morton is a citizen of the State of Delaware and it is clear that intervention by Morton would constitute a claim against the State of Utah. It makes no difference that Morton in *form* seeks simply to intervene as a defendant and merely to "answer" the complaint of the State of Utah when in truth and fact the real substance of the answer proposed by Morton is a denial of the title claimed by the State of Utah and a claim by Morton of ownership in itself to the same lands. The nature of Morton as a party must be determined by the essential nature and effect of the position Morton occupies in the proceeding, rather than by the formal designation of Morton as a defendant. *In Re Ayers*, 123 U.S. 443, 490-508 (1887); *Ex parte New York*, 256 U.S. 490, 497-502 (1921); *Worcester County Trust Co. v Riley*, 302 U.S. 292, 296-98 (1937); *Ford Motor Co. v Department of Treasury of Indiana*, 323 U.S. 459, 364 (1945).

While one or two lower courts have supposed that a sovereign may impliedly immunity by instituting an action, the Un Supreme Court has never so held. In fact opposite has been the express holding of th Court and the great majority of lower cour *States v. Sherwood*, 312 U.S. 584 (1941); *Schild*, 161 U.S. 10, 16 (1896); *Stanley v.* 147 U.S. 508 (1893); *Nassau Smelting & Works, Ltd. v. United States*, 266 U.S (1924); *Carr v. United States*, 98 U.S. 433, Perhaps the lower federal courts have had quent occasion to apply the rule announ Supreme Court. Thus, if the government br demnation action to quiet title to land, it do sent to suit by one who wishes to intervene title. *United States v. 706.98 Acres of La* Supp. 272 (W.D. Ark. 1957). See Also *U v. Dry Dock Savings Inst.*, 149 F.2d 91 1945); *United States v. Great Northern* Supp. 651 (D. C. Mont. 1940), affirmed *su Donald v. United States*, 119 F.2d 821 (9th modified on other matters and affirmed, *G ern Ry. v. United States*, 315 U.S. 262 (194 *Oil & Refining Co. v. Sun Oil Co.*, 190 F. (5th Cir. 1941); rehearing denied, 191 F.2d cert denied, 342 U.S. 920 (1952).

The cases cited in the paragraph nex relate directly to the question of an implie the United States, but actually apply with to the question of an implied waiver by t Utah. Those cases have been cited under t

show that Utah has not impliedly consented to be sued, but they are also intended to apply to Point II, next succeeding, to show that the United States has not impliedly consented to be sued. With this explanation, those cases will not be cited further under Point II. Suffice to say, in conclusion of Point I, that the answer which Morton seeks to file obviously constitutes a claim against the State of Utah, which claim is barred by the Eleventh Amendment above quoted. The State of Utah cannot be subjected to such claim unless it clearly has granted consent to be so sued, and it has not granted such consent.

POINT II

THE UNITED STATES HAS NOT CONSENTED TO SUIT BY MORTON IN THE PRESENT LITIGATION.

It is clear from the content of Morton's proposed answer that it claims lands which are also claimed by the United States as well as by the State of Utah. The United States has not consented to suit by Morton in this litigation, unless it can be contended that the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349 (hereinafter referred to as the Great Salt Lake Lands Act) constitutes such consent. But Section 2 provides that the provisions of the act would not affect "any valid existing rights or interests, if any, of any person, partnership, association, corporation or other nongovernmental entity, in or to any of the lands within the below said meander line, . . ."

The act then provides in Section 5 that Utah may elect to make an outright purchase or to litigate and

then purchase the ownership interest, if any, of the United States. If Utah elects to litigate, it is provided that the State of Utah may maintain an action in the Supreme Court of the United States and consent is given to join the United States as a defendant. There is nothing in that act which contemplates or remotely suggests that consent is given for the United States to be subjected to any suits or claims by anyone other than the State of Utah. Morton certainly would not have been indispensable to the outright purchase option, and the end result of the litigation option will be identical to the outright purchase option, at least to the extent that Utah will, in either event, obtain any interest of the United States. Morton will not be harmed any more by litigation than it would have been by an initial purchase. The fact is that it would not be harmed at all by either course of action.

But this argument, at least at this point, is not directed to the issue of whether Morton would be harmed by any final decree in the pending litigation, but is intended to show that the congressional intent was simply to involve only Utah and the United States — and no other parties — in either the outright purchase option or the litigation and purchase option.

The statutory language is therefore clear that no private claims can be affected by any provision of the act, or by any purchase or litigation thereunder. The act grants consent for suit by the State of Utah against the United States, but for no other suits or claims against the United States. Morton would seek the exact opposite, *i.e.*, to intervene in the litigation pro-

vided for by the act and to obtain a direct adjudication affecting its private claims.

The congressional hearings held with respect to S. 265 and H.R. 1791 and H.R. 6267 make clear that the express intent was that the litigation authorized by the act would include only the State of Utah and the United States, and that private claimants would not be involved in any event and their interests would in no wise be affected.

Published congressional hearings are, of course, admissible to ascertain legislative intent, and, more particularly, the expressed intent of the sponsor or draftsman of the bill deserves particular attention. See, generally, 2 Sutherland, *Statutory Construction*, Section 5009, pp. 495-98 (3d Ed. 1943).

At pages 91-92 of the published Hearings before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs concerning S. 265 (Eighty Ninth Congress, First Session), the following exchange occurred between Senator Frank E. Moss, *sponsor* of the bill, and Earl J. Knudson, president of the Great Salt Lake Lands Association (an organization of private claimants):

> Senator Moss. Thank you, Mr. Knudson. I corresponded with Mr. Adams and I know he does have great information about the lake. One thing that troubles me a little here is that the bill has been drawn by the Legislative Counsel, and by the land board and by me, and by everybody involved, to try to eliminate absolutely this private ownership matter. It says:

Provided, however, That the provisions of this Act shall not affect—
Shall—that is mandatory—

Shall not affect any valid existing rights or interests of any person, partnership, association, corporation, or other non-governmental entity in or to any of the lands within and below said meander lines and also within the Bear River Migratory Bird Refuge.

Now what we have tried to do and what I think the language—and if you can tell me how to make it more mandatory than that—I would be glad to entertain the suggestion, is to eliminate this question of any kind of derogation of any title that any private owner has by this legislation. Now if we get into discussion of problems that private owners have had in times past or so, we are not talking to the subject because this bill excludes all of that.

So that is out. We are not doing anything to that. We are just trying to solve a problem that is existing between the State Government and the Federal Government. I am not sure that your testimony is particularly to the point in this.

Similary, at pages 63-64 of the published Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs concerning H.R. 1791 and H.R. 6267 (Eighty Ninth Congress, Serial No. 89-32), the following exchange occurred bebetween Rep. David S. King, one of the sponsors, and Robert S. Campbell, Jr., legal representative of the Island Ranching Company (a private claimant):

Mr. King: On the matter of the title, I am sure you are aware, and I will repeat it for the record, that the bills that we are considering contain this very specific language:

> *Provided, however,* That the provisions of this Act shall not affect any valid existing rights or interests, if any, of any person, partnership, association, corporation or other non-governmental entity in or to any of the lands within and below the said meander line.

So that the position, at least the position of the sponsor of one of these bills, myself, I assume I speak for my distinguished colleague, is that we do not in any way presume to interfere with the title, if any, to the abutting private owners. And as you, yourself, pointed out and I agree with you wholeheartedly, we don't have the right to interfere with that even if we wanted to because certainly the Constitution would guarantee the preservation of those rights. And it would take more than an act of Congress to deprive your client of any vested rights without due process of law. I would like to make the record abundantly clear that this bill does not contemplate divesting any private landowners of any vested rights which they might have. The bill takes no position and I take no position as to whether these private abutting landowners do or do not have rights. This is something which the courts eventually will determine. *But the feeling of this person is that in the meantime we should settle the conflict between the State and the Federal claims to this land. At least, that much can be done now and then adjudicating the rights of the private landowners is something that could take its time, and no doubt will be done.* (Emphasis added.)

There is not the slightest suggestion in the language of the Great Salt Lake Lands Act or in the published congressional hearings relating thereto that Congress intended to subject the United States to claims by

private persons in the litigation authorized by the act. The exact opposite is clearly expressed.

Congressional consent is required before suit can be maintained against the United States in an original action, even when a state is the claimant. *Arizona v. California,* 298 U.S. 558 (1935); *Kansas v. United States,* 204 U.S. 331 (1906); and *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). It is equally clear that such consent statutes must be express, and they will be narrowly construed. *Price v. United States,* 174 U.S. 373 (1899), and *McMahon v. United States,* 342 U.S. 25 (1951). With respect to implied consent, see cases cited at page 5, *supra.*

Even though the United States did not elect to raise the question with respect to lack of consent by the United States to the claim sought to be asserted by Morton, the question is jurisdictional and may be raised by any party or by the Court. *Minnesota v. Hitchcock,* 185 U.S. 373 (1902).

POINT III

THE JURISDICTION OF THE UNITED STATES SUPREME COURT IN ORIGINAL ACTIONS DOES NOT EXTEND TO SUITS BETWEEN A STATE AND CITIZENS OF THE SAME STATE.

The judicial power which the people, through the United States Constitution, conferred on the federal judiciary is found in U. S. Const. art. III, § 2, which provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls,—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It has been repeatedly held that the first paragraph above quoted *confers* the judicial power and the second paragraph simply *distributes* the judicial power conferred by the first paragraph, but does not confer any additional judicial power. The second paragraph distributes the judicial power into *original* and *appellate* jurisdiction. Original jurisdiction in the United States Supreme Court is dependent on the *character* of the parties, and this category includes those cases in which a state is a party. The other category of jurisdiction is appellate, and includes all other cases where judicial power is conferred but where jurisdiction is not original.

The first paragraph of Section 2, in granting the

judicial power, essentially makes a division between the *subject matter* of the cases over which the federal court shall have jurisdiction and those cases where the *character* of the parties will be sufficient to sustain jurisdiction. The former class of cases includes those which arise under the Constitution, laws and treaties of the United States (to the extent that such cases will succeed or fail, depending on the construction or interpretation given to the pertinent provision of the federal constitution, statute or treaty). The latter class of cases includes controversies where states are involved, including those between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens or subjects — but not between a state and its own citizens.

With respect to the grant of judicial power where the *character* of the parties is sufficient to sustain jurisdiction, it must be emphasized that there is no grant of judicial power for controveries between a state and its own citizens. On the other hand, in the class of cases where the *subject matter is controlling* (when such cases arise under a provision of the federal constitution or a federal statute or treaty), it makes no difference who the parties are. There is judicial power and jurisdiction in the federal courts over cases between a state and its own citizens when, but only when, it is necessary to construe a federal constitutional, statutory or treaty provision.

This is to say that there is no jurisdiction at all in any federal court between a state and its own citizens if jurisdiction must depend on the *character* of the state as a party to sustain jurisdiction, because the only juris-

diction in federal courts between a state and its own citizens would be when jurisdiction is dependent upon the nature of the subject matter.

Since the second paragraph of § 2, Article III of the United States Constitution, as quoted above, distributes the jurisdiction of the United States Supreme Court so as to make such jurisdiction *original* when it is dependent upon the character of the parties, it must necessarily follow that there can never be such an original action between a state and its citizens when the basis of jurisdiction would be dependent upon the *character* of the state as a party. Likewise, it must necessarily follow that when the *subject matter* of a case sustains jurisdiction between a state and its own citizens, such jurisdiction is *appellate only* in the United States Supreme Court, and such cases must, therefore, *originate* in the *lower federal courts* and only reach the United States Supreme Court on appeal. Original jurisdiction is implemented by 28 U.S.C. § 1251.

In summary, Article III, Section 2 of the United States Constitution is a direct grant and limitation with respect to the jurisdiction of this Court in original actions, and it is obviously beyond the power of Congress to enlarge the federal constitutional limitation on original jurisdiction. *Marbury v. Madison,* 1 Cranch 137, 173-74 (1803).

The jurisdictional limitation now under discussion is quite different from the jurisdictional question relating to whether the State of Utah or the United States has consented to suit, as discussed under Points I and II above. For even if it should be determined that both

the State of Utah and the United States have consented to be sued through the claims which Morton seeks to assert in its answer, this Court would be without jurisdiction to allow citizens of the State of Utah to intervene as indispensable parties in any form or fashion which would result in a claim by them being asserted against the State of Utah. Morton is in essentially the same position as other private claimants, and the Office of the Solicitor General specifically stated in letters directed to the Special Master, Honorable J. Cullen Ganey, under dates of September 20 and October 26, 1967, that all private land claimants are in the same position as Morton insofar as they would be indispensable parties to this action. By far the majority of such private claimants are citizens of the State of Utah and if Morton were to be permitted to intervene as an indispensable party, then all private claimants would have to be brought in as indispensable parties, and the present litigation would then necessarily assume the complexion of a great many of the citizens of the State of Utah claiming against the State of Utah, and the State of Utah likewise claiming against many of its own citizens. That result would totally defeat the jurisdiction of this Court and the Court would be duty bound to dismiss the action at that point for lack of jurisdiction.

Cohens v. Virginia, 6 Wheat. 264 (1821); *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824); *Florida v. Georgia*, 17 How. 478 (1854); *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553 (1870); *Florida v. Anderson*, 91 U.S. 667 (1875); *Hans v. Louisiana*, 134 U.S. 1 (1889); *United States v. Texas*, 143 U.S. 621

(1892); *California v. Southern Pacific Company*, 157 U.S. 229 (1895); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Minnesota v. Northern Securities Company*, 184 U.S. 199 (1902); *New Mexico v. Lane*, 243 U.S. 52 (1920); *Texas v. Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1921); *Louisiana v. Cummins*, 314 U.S. 577 (1941); 2 Willoughby on the Constitution of the United States, § 823, p. 1924 (2d ed. 1929); 2 Watson on the Constitution, pp. 1126-27 (1910).

Thus, without regard to any ruling which this Court might make as to whether the State of Utah and the United States have consented to be sued by Morton and the other private claimants, a determination that any private claimants who are citizens of Utah are indispensable parties would oust this Court of jurisdiction to consider any phase of the litigation.

POINT IV

THE QUESTION OF INDISPENSABILITY IS DETERMINED BY PRACTICAL CONSIDERATIONS.

No fixed rule or rigid formula can be framed to apply to every case to determine whether a person is indispensable. Each case must be judged in light of its particular facts, and the court must determine in light of all of the relevant practical considerations whether the person in question claims rights so inseparably connected with the issues in litigation so as to make it impossible to proceed to any useful decree. In all respects the determination by the court is strictly discretionary.

The question of indispensability is not a question of jurisdiction, but is simply a concept created by courts of equity to determine when the court ought not proceed with litigation when certain parties who ought to be before the court have not been joined or cannot be joined. There has been much discussion with respect to the utility of the indispensable party doctrine, but, whether it is desirable or not, the fact remains that it still exists and frequently must be considered by the courts. In order to arrive at a proper determination of the criteria and considerations which should be viewed by the courts in determining indispensability, a review of the reasons for the 1966 revision of Rules 19 and 24 is most helpful.

Prior to 1780, there was no such concept as an indispensable party, but thereafter courts of equity began to shape a doctrine that ultimately was recognized as the indispensable party doctrine. Critical of the evolution of that doctrine, as well as its current usefulness, Professor Geoffrey C. Hazard, Jr. has written an excellent account of the growth of the doctrine and has suggested reasons why it should be abandoned. Hazard, *Indispensable Party: The Historical Original of a Procedural Phantom*, 61 Col. Law Rev. 1254 (1961). At pages 1255-56, Professor Hazard observes:

> During the seventeenth and eighteenth centuries, Chancery developed fairly workable necessary party rules, with exceptions designed to meet practical convenience and necessity. These rules may be summarized as follows:
>
> 1. All persons who are interested in a controversy are necessary parties to a suit involving

that controversy, so that a complete disposition of the dispute may be made.

2. Joinder of necessary parties is excused when it is impossible, impractical, or involves undue complications.

3. A person who is not a party, unless represented by one who is a party, is not bound by a decree.

In about 1780 and the three decades that followed, a confused series of opinions were rendered which attempted to establish an additional rule: no decree that does not completely dispose of the controversy will be entered. Upon this rule is founded the indispensable party notion. It was conceived in dictum and lives by inertia. It should long since have been laid to rest.

Perhaps the best and most exhaustive analysis of how the indispensable party doctrine has caused some terminological confusion in court decisions and among some writers, is Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. Law Rev 327, 484 (1957). This article has oft been cited in complimentary fashion by courts and text writers, as well as by the Advisory Committee (with respect to the 1966 revision of Rule 19). Several excerpts from the article are included herein, but the footnotes are omitted. The basic considerations for joinder are summarized by Reed as follows:

* * * There are three classes of interests which may be served by requiring the presence of additional parties in an action: (1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice. Probably no catalog of cases

> upon the basis of such a classification can be made because few cases are explicit in this regard and many represent an indistinguishable mixture of two or all three of these interests. Nevertheless, clear thinking will be materially aided if it is remembered that the real problem in any compulsory joinder case is whether the initial choice of parties by the plaintiff is to be overborne by some combination of these three countervailing interests — not by a blind adherence to an elderly formula. (page 330)

It is further pointed out by Professor Reed that in many instances it is more desirable to do justice "by halves" than to do no justice at all:

> * * * the courts should be kept free to handle meritorious litigation. There is plain economic waste in duplicate litigation. If it can be made to appear to a court that a controversy presented to it will not be completely settled in A's absence, the court is clearly justified in inquiring whether it ought to require A's presence, or, lacking it, to dismiss the case. It will be observed immediately, however, that by nature minimizing litigation and conserving courts' energies are relative values to be weighed with other values in the scale of justice. "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems." The equitable policy of doing justice "entire and not by halves" can be made to yield to countervailing factors which are more pressing. The mere fact that a second action may be required to determine the totality of issues involved in a controversy is not a bar to the maintenance of the incomplete first action. (page 335)

And further:

> This other principle arises out of the fact that although it is important to determine a controversy in one package where possible (and all thinking here must be conditioned by the need and desire to conserve judicial resources), in some cases plaintiff will not be able to assert his claim at all if not permitted to do so in the absence of some "interested" parties. The existence of this situation is a factor which should prompt the court to proceed to a hearing and determination of the case if it possibly can do so. Courts exist for the determination of disputes among the people; in a particular litigation there is an obligation on the court to make a meaningful determination if at all possible. Because the law grants almost no choice between the use of courts of law and forcible rectification of wrongs done, it seems to follow that the sovereign is under a correlative obligation to provide a reasonably effective mechanism for dispute settling, not only in general but in particular cases. The fact that unavoidably there may be required two or more actions to dispose of a dispute should not preclude the court from considering the case, despite the inclination to avoid repetitive litigation. If only through multiple suits can justice be done, there is nothing inherent in our judicial system forbidding those several suits. Minimization of litigation is not an end in itself, and it has its price. **(pages 336-37)**

Professor Reed emphasized that, if at all possible, the court should proceed in the absence of a person who cannot be brought before the court, if the decree can be shaped so as to give the plaintiff at least part of the relief prayed for:

> * * * If plaintiff is willing to forego his claim against A, at least temporarily, what reason is there for withholding adjustment of claims

among the parties present? The absolute barrier in the case involving A alone is lacking here, and it is a blind justice which can see in this instance no method of (and no reason for) granting plaintiff as against defendants in court whatever relief he seems entitled to. If the decree can be shaped to give the plaintiff at least some of the relief he desires while protecting A's interests, the court ought to proceed with the case.

In short, a court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to *avoid an adverse factual effect on the interests of absent persons;* on the other is the policy of seeking to *give a petitioner as much merited relief as possible.*

* * *

As to the second principle, instead of emphasizing a court's desire to do justice entire rather than by halves — both to avoid double vexation and to conserve judicial resources — the proposed statement calls attention to an obligation on the court to try to devise a way to proceed in the excusable absence of A if, otherwise, plaintiff will be unable to obtain a judicial determination of the controvery between himself and defendant. This does not abandon the historic, almost axiomatic concern for minimizing the quantity of litigation. But emphasis on reducing the number of adjudications is not needed in cases troubled by questions of required joinder. The need rather is for recognition of the possible inability of the plaintiff to proceed at all, anywhere, if foreclosed here. (pages 338-39)

Professor Reed cites *Hicks v. Southwestern Settlement and Development Corporation*, 188 S.W.2d 915 (1945), as an ideal example of using the pragmatic approach in determining indispensability. In that case

a number of tenants in common brought an action for ejectment and damages, claiming title to lands from which oil and gas had been withdrawn by defendants. The pertinent issue was whether a substantial number of persons who were tenants in common with plaintiffs, but who were not parties to the action, were indispensable. The court pointed out that 63 of the absent tenants in common were residents of at least four additional states, that some were minors, and that some addresses were unknown. Further, the court mentioned that there were at least 512 other tenants in common about whom the record was silent as to their residence. Referring to the court's enumeration of the complexities and practical difficulties if all of the tenants in common were to be brought into the litigation as justification for finding the absent persons not indispensable, Professor Reed observes:

> Here exemplified is the very approach suggested throughout these materials. *This* is the way to do it! Recognition is given to the pressing need to conclude the controversy as neatly and expeditiously as possible. Defendants must be protected from repetitive litigation, if possible. But the countervailing factor is the tremendous difficulty, if not impossibility, of obtaining the presence of all interested — numbering in the hundreds. The court's opinion, which is long, contains some discussion of the nature of the rights involved. The court does conclude that the rights of the tenants in comman, although technically several, are joint within the meaning of the rule that persons having a joint interest shall be made parties, and that all else being equal there is much force in defendants' position that the suit should be abated unless all are joined. But all else is not equal; indeed, the

> force of the difficulty argument outweighs, and plaintiffs are permitted to proceed without their fellow tenants. (pages 492-93)

Selecting another example of an effective, pragmatic approach in balancing the interests to determine indispensability, Reed comments on *Ambassador Petroleum Company v. Superior Court*, 208 Cal. 667, 284 Pac. 445 (1930):

> * * * The state of California sought under statute to enjoin some forty-two operators (lessees) in an oil field from committing unreasonable waste of natural gas. In the cited action the operators made application for a writ of prohibition to restrain the proceedings until the lessors of the land be joined, for the asserted reason that the lessors' royalties on production would be affected. Although suggesting by way of dictum that a different rule would apply in purely private disputes, the court held that the lessors were not indispensable even though they would be "bound" by the ruling.
>
> * * *
>
> The court did not stumble over concepts of inseparability of rights or over lack of power to determine the legal position of absent parties. Instead, it appears to have weighed the importance of protecting the public interest, as expressed in the conservation law, against the importance of protecting the interests of absent owners, and to have found that the former overbalanced the latter. Whatever possibility there was of bringing in the absentee owners by constructive service of process was apparently overcome by the impracticability of citing in so large a number. The court's method here is commendable. Although there was the possibility that absent persons would be adversely affected fac-

> tually — and this usually serves to bar consideration of the case — that possibly was outweighed by the need for gas conservation. When the court stated that a different result might obtain in purely private disputes, that simply was recognition that in the absence of the public interest in conservation there would be no compelling reason for proceeding without the owners. It is not to say that the court's power is diminshed or its discretion shackled. (pages 498-501)

Reed, again emphasizing that a court should give every possible consideration to providing some relief for plaintiff by shaping its decree so as to protect absent persons, observes:

> * * * As indicated repeatedly above, a court should consider carefully the harm which may be done to the interest of an absent person, and it should avoid making meaningless and incomplete determinations; but it must seek also to avoid a ruling which serves, in effect, to deprive a plaintiff of all opportunity for a judicial determination of the merits of his claim. If plaintiff clearly has a remedy elsewhere should he seek to pursue it, it is not especially serious if he be sent out of this court for non-joinder of A; and it should not require much of an adverse effect on A to cause the court, on motion of a party or sua sponte, to move to protect A by ordering him joined on pain of dismissal of the action. But if the plaintiff likely cannot maintain his action elsewhere — due to limitations on the jurisdictional reach of the various courts — then the court ought to consider every means available to retain his case for adjudication, including a careful weighing of the likelihood of factual injury to A's interest and its relative value, and a consideration of the possibility of shaping a decree to grant plaintiff as much merited relief as

possible while safeguarding A's interest. (page 523-24)

Professor Reed's brief conclusion to his 104 page article is the following:

> If one accepts Dean Pound's theory that our legal system in development alternates between strict rule and formula on one hand and informality and judicial discretion on the other, and that contemporary jurisprudence is in one of the liberal, more flexible eras, our thesis is, at very least, riding the pendulum; and one gains if only from realizing that labels no longer determine outcomes. It may not be fruitless to catalog cases to show, e.g., that courts often call junior mortgagees necessary or indispensable in foreclosure suits, or that joint obligees are required to sue together; most cases fit into the general pattern. But no lawyer worth his calling can afford to forget for one moment that such lists give rise to little more than a presumption. *There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence.* The descriptive term assigned to him is irrelevant to the process of decision. (pages 537-38) emphasis added)

The Advisory Committee in its 1964 preliminary draft of the proposed revision to Rule 19 considered dispensing with the indispensable party doctrine, but concluded that it was untenable to do so. See, *e.g.*, 3 *Moore's Federal Practice*, par. 19.01 (4.-1), page 2107. Rule 19 (a), prior to the July 1, 1966 revision, provided as follows:

> (a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made

parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Rule 19, (a) and (b), as now revised, provides as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a

> judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Committee Note of 1966, relative to the revision of Rule 19, is rather clear in demonstrating that the revision was intended to require courts to make a realistic, pragmatic, practical evaluation of the actual fact situation in each case to determine whether some relief could be granted without substantial injury to absent persons. In this regard, and as acknowledged by the Committee, the pragmatic approach suggested by Professor Reed has now been adopted by Rule 19. Representative extracts from the Committee Note of 1966, as printed in 3 *Moore's Federal Practice*, pp. 2109-14, are set forth below:

> Whenever feasible the persons materially interested in the subject of an action — see the more detailed description of these persons in the discussions of new subdivision (a) below — should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished — a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue — the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

* * *

When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowl-

> edged by the courts. See *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement Pond Co. v. Iron Moulders' Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.
>
> * * *
>
> The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A further indication of the current emphasis on considering the practical factors of each case individually to determine indispensability is found in Barron and Holtzoff, 2 Federal *Practice and Procedure*, Sections 511-12, pp. 25-29 (1967 Pocket Part). The following quotations are illustrative:

> Rule 19 was completely rewritten in the 1966 amendments of the rules. Here, as with Rule 23, "a restructuring of major proportions" was necessary "to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." Accordingly the time-honored categories of "indispensable," "necessary," and "proper" have been discarded and that portion of the text in the main volume which defines them is no longer of relevance. The concern of the amended rule is with the practical realities of joinder.
>
> * * *

> Rule 19 was completely rewritten in 1966. The former text of the rule was defective in many respects, as is pointed out in the text of the main volume and elsewhere. It purported to speak in rigid legal categories, when what is in fact involved is a discretionary balancing of conflicting interests. The new emphasis of the amended rule is evident even from the title, which speaks of "Joinder of Persons Needed for Just Adjudication," where the old rule spoke of "Necessary Joinder of Parties." The new rule will produce a change of method, more than of result. Probably most cases will be decided the same way under the new rule as under the old, but the new rule requires the court to face squarely the pragmatic considerations which properly should be controlling.

It is uncertain whether or to what extent the indispensable party doctrine has now become one of substance rather than procedure. But that distinction appears not to be critical to the case at bar. While the rule unquestionably was created as a rule of procedure by the courts of equity, it subsequently was mistakenly considered in a number of cases in relation to various concepts of constitutional due process. Recently, in *Provident Tradesmens Bank and Trust Company v. Lumbermens Mutual Casualty Co.*, 365 F.2d 802, (3d Cir. 1966, cert. granted 386 U.S. 940, 1967), the court held the doctrine to be substantive, and beyond the provisions of Rule 19 (although a persuasive dissenting opinion argued to the contrary). The majority opinion in *Provident* has been rather generally criticized by the law reviews. See, *e.g.*, *Federal Rules of Civil Procedure —Rule 19 and Indispensable Parties*, 65 Mich. Law Rev. 968 (1967) and *Note*, 80 Harv. Law Rev. 678

(1967). Moore, differing with the "substantive" view taken by the court in *Provident*, said the distinction may be essentially one of semantics, because:

> Substantive law, federal or state, as the case may be, will determine the rights and interests of the parties before the court, their interrelationship, and the relationship of those rights and interests to those of persons not before the court. Those substantive rights, interests and relationships evaluated, the court then must determine in the light of procedural due process, fair judicial administration, and the criteria set forth in Rule 19 whether it can proceed with the parties before the court or whether there is an indispensable party that is not before the court. In the latter event, unless he can be and is made a party, the action should be dismissed. Moore, *op cit., supra*, at page 2120.

Having shown that the determination of indispensability is one of practical consideration, rather than rigid rule or formula, it is advisable now to show that a determination of intervention as a matter of right is controlled by essentially the same considerations. Rule 24(a), relating to intervention, prior to its revisions permitted one to intervene as a matter of right only when he would be *bound* by the judgment and was not adequately represented in the action. The question as to whether one would be bound was interpreted to mean that the judgment would have to be *res judicata* as to him. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). The July 1, 1966 revision of Rule 24(a) relaxed the requirement of being "bound" in the sense of *res judicata*, and provided for intervention as of right for one who "is so

situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." The present text of Rule 24(a) is as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In Barron and Holtzoff, *op cit*, supra, at page 122, the authors note the impractical construction placed on Rule 24 prior to its revision, and then comment on the result to be achieved from the revision:

> In 1966 Rule 24(a) was amended by striking subdivisions (2) and (3), and substituting a new subdivision (2) which permits intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties." The emphasis on the practical effect of the action, rather than its conceptual res judicata effect, will resolve the dilemma created by the Supreme Court's construction of the existing rule.

The Advisory Committee commented that the desired result to be achieved from Rule 24(a) as revised was to require consideration of the same practical factors required by Rule 19 as revised. The Advisory Committee's 1966 Note to Rule 24(a), quoted in Moore, *op cit, supra*, Vol. 4 at page 7, contains the following explanation:

> The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict consideration of res judicata. * * *
>
> An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

The Committee thus observes that under Rules 19 and 24 as revised, a person desiring to intervene as a matter of right will be subjected to the same evaluation as that used to determine whether a person is an indispensable party. But this probably also was true, at least to a large extent, under Rules 19 and 24 prior to their July 1, 1966 revision. See Reed, *op cit, supra*, at page 529, note 382.

Perceiving no sound reason for making any major distinctions in the case at bar as to Morton's "intervention as a matter of right" and Morton's position

as an "indispensable party," since the practical considerations are the same, the analysis in this brief will proceed to follow the cases relating to indispensable parties, since that is the approach Morton has selected.

The major cases relating to the indispensable party doctrine have examined each case with respect to the competing equities, both before and after the rules revision in 1966. The general criticism leveled at the decisions prior to the 1966 revision was not that such decisions were incorrect, but that sometimes the courts used contradictory and confusing terms in referring to the doctrine as "jurisdictional" and in talking in terms of fixed rules. It will now be demonstrated, however, that the United States Supreme Court, and most inferior courts, have for many years used the pragmatic approach suggested by the text writers, the Advisory Committee, and the text (and spirit) of Rules 19 and 24 as revised.

The question of whether a party is indispensable is determined on the facts of each particular case, and this Court announced that fundamental proposition in the landmark case of *Shields v. Barrow*, 58 U.S. 130 (1854). It was there made clear that there is no prescribed formula for determining in every case whether a person is an indispensable party.

Even prior to the *Shields v. Barrow* decision, this Court had made clear that the indispensable party doctrine was one that had been created by the courts and its use and application were matters for judicial discretion. Thus, in *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-67 (1825), Chief Justice Marshall, speaking for the Court, said:

> It is contended that he [plaintiff] is a tenant in common with others, and ought not be permitted to sue in equity, without making his cotenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require, that all parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. *This equitable rule, however, is framed by the court itself, and is subject to its discretion.* (Emphasis added).

This Court has also emphasized that one of the practical considerations which must be given substantial weight is whether plaintiff has available another forum in which to seek relief. If not, and if to classify an absent person as an indispensable party would defeat the jurisdiction of the court, then every attempt should be made to frame the decree in such a manner as to do justice between the parties before the court. In *Payne v. Hook*, 7 Wall. 425, 431 (1868), this Court explained the reason for the rule:

> But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit.
>
> The necessity for the relaxation of the rule is

> more especially apparent in the courts of the United States. where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.

Even if it should appear that an absent person might have rights that ordinarily would be injured or impaired by the relief requested by plaintiff, a court of equity will strive to shape its decree so that the rights of such absent persons are preserved. If this can be done, the court will proceed to a decree and the absent persons will not be deemed indispensable. This is explained in *Waterman v. Canal-Louisiana Bank Company*, 215 U.S. 33, 49 (1909):

> The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the courts without injuriously affecting the rights of such absent party. 1 Street's Fed. Equity Practice, § 519.
>
> If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons.

A most perceptive effort to shape a decree so as to protect absent persons is reflected in *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927). In this case Judge Learned Hand considered a number of procedures which might be followed in shaping the decree, but

was compelled to conclude that no approach would be adequate because of the uncertainties involved (plaintiff sought to recover moneys due from defendant, but plaintiff's attorneys, who were not parties, had a lien priority to the extent of a one fourth interest in the proceeds sought to be recovered). Before considering alternative methods of shaping the decree, Judge Hand recognized that such efforts should be made in light of the facts of the particular case. At page 172 of the opinion Judge Hand observed:

> In many decisions, it has been laid down that the test is one of substance; that is, whether the plaintiff can obtain relief which will later leave open to the absent parties the effective assertion of their rights [citing *Shields, Payne, Waterman,* and other decisions]. The general statement does little to advance matters, until one knows what is the test by which to ascertain when such rights can be protected and when not, *and this we understand to be an entirely practical question, dependent in each case upon the facts.* (Emphasis added).

In affirming dismissal, Judge Hand observed that other forums were available where the issues in dispute could be fully adjudicated among all interested persons.

Other federal cases, though not involving original actions in this Court, have followed the same principles established in the cited opinions of this Court. Thus, in an action by an oil and gas lessee against a party claiming an interest in the leasehold property, it was held that the lessor was not an indispensable party to the litigation even though his presence would be necessary for a complete adjudication of all the questions involved in the litigation. However, the plaintiff sought

no relief against the lessor and the decree was carefully limited in its legal effect to the parties before the court. *Texas Co. v. Wall,* 107 F.2d 45 (1939). See, also, *Lubin v. Chicago Title and Trust Co.,* 260 F.2d 411 (1958). Also, it has been held that one tenant in common could maintain a suit to enjoin the infringement of his water rights without joining his co-tenant. *Union Mill & Mining Co. v. Dangberg,* 81 F. 73 (1897). Compare *Humble Oil and Refining Co. v. Sun Oil Co.,* 190 F.2d 191 (1951). And of particular interest is *McArthur v. Rosenbaum Co. of Pittsburgh,* 180 F.2d 617 (3d Cir. 1950), wherein the court held that certain owners of real property were not indispensable, even though indirectly affected, when the decree could be granted and limited to the parties actually before the court.

The only case cited by Morton in its brief in support of its position as an indispensable party which bears any reasonable resemblance to the case at bar is *California v. Southern Pacific Company,* 157 U.S. 229 (1895). So far as the jurisdictional question therein encountered is concerned, the case is strictly in point; but with respect to the question of indispensable parties, the case is clearly distinguishable for a number of reasons. First, the California state courts afforded an alternative forum. Second, California as plaintiff sought a complete title adjudication, quieting title in itself as against absent parties (157 U.S. 229, 230, 235). Third, to determine the rights of the Southern Pacific Company, it would have been necessary to adjudicate directly upon the rights of the City of Oakland (an absent person), since the Southern Pacific Company

derived its claim of title through Oakland and Oakland still claimed ownership interests. Fourth, the Court specifically noted that the California Legislature had not authorized the bringing of the action, contrasted with the specific enactment of the Utah Legislature in this case.

It must be recognized that, so far as the indispensable party question is concerned, the *California* case bears very little resemblance to the case at bar, because in this case Utah seeks only a determination of the federal interest, if any. While the complaint alleges ownership in Utah so as to defeat the claims of the United States, it is obvious from the prayer of the complaint that Utah seeks no adjudication which could affect or injure Morton. The prayer, at pages 11-12 of the complaint, reads as follows:

> WHEREFORE, plaintiff prays:
>
> 1. That a decree be entered by this Court quieting title in the State of Utah as against any and all claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest whatsoever to any part of said land or minerals located therein or any part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting any right, title, or interest in or to any of said land or minerals or any part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

2. That this Court appoint a master to hear and consider all admissible evidence relating to the claims of ownership and to make his findings and recommendations to this Court.

3. For such other and further relief as this Court may deem proper and necessary in these premises.

The State of Utah has claimed only against the United States. Against Morton no relief has been asked and Morton is not indispensable. As this Court observed in *Payne v. Hook*, 7 Wall. 425, 432 (1868):

> It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked.

And, as observed by Professor Reed, *op cit, supra* at 538:

> There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence.

POINT V

THE PRACTICAL CONSIDERATIONS IN THE CASE AT BAR OVERWHELMINGLY SUGGEST THAT THE LITIGATION SHOULD PROCEED WITHOUT MORTON.

Having concluded that it is within the sound discretion of this Court to determine whether Morton is indispensable, and having further concluded that such discretion is to be exercised after viewing all relevant considerations of a practical and equitable nature,

it now becomes necessary to examine the particular facts of the case at bar. This is perhaps best accomplished by itemizing the major equitable factors which make the instant case strikingly unique and which present a compelling argument for continuing the litigation in the absence of Morton.

A. The Nature of the Controversy is Highly Unusual.

The Great Salt Lake, in and of itself, is unique. While not the only "dead sea" in the world, it is the only inland salt sea where the slightest fluctuation in water level has such a profound impact on new land inundated or new land exposed. The feature of the lake which is particularly unusual to this litigation is a feature which is not actually in litigation. This is to say that the actual lands in dispute have no significant inherent value, but the brines in the lake (the ownership of which is not an issue in this litigation) have a very substantial mineral value. The mineral lessees of the State of Utah cannot effectively extract minerals from the lake without building expensive extraction facilities on the lands adjacent to the lake. It is, therefore, necessary to obtain title security to the exposed lands around the lake in order to develop and extract the minerals within the lake brines. One of the peculiar facts of this case, then, is that the denial of any relief to plaintiff will not only prevent any solution to the title questions actually in issue, but will further prevent and totally frustrate mineral development of the brines. Since these brines have a value estimated to be many billions of dollars, this certainly is an equitable consideration entitled to great weight.

B. There is no other Forum Available to Determine the Present Controversy.

If Morton and the other private claimants similarly situated are determined to be indispensable parties and the case thus had to be dismissed for lack of constitutional jurisdiction, then it necessarily follows that there is and can be no other forum for litigation of the respective claims to the lands in question. This is so because the claims of the United States would not be determined or resolved, and the United States would appear to be just as indispensable to any action in the state courts of Utah as Morton would be in this action. Congress would be without power to enact new legislation to provide consent for the United States to be sued in the federal district court of Utah, for there would be no constitutional jurisdiction for a quiet title action between a state and its citizens in the federal district courts. If the present action were to be dismissed, there would thus be no state or federal court which would or could have jurisdiction over all of the indispensable parties. Neither the Utah Legislature nor the United States Congress could by legislation provide a forum. The present vexation and crippling uncertainties would persist—perhaps forever!

C. A Desire to Settle the Present Controversy Between Utah and the United States has been Demonstrated by the Legislative and Executive Branches of both Governments.

The crying need for an adjudication to settle the differences between Utah and the United States has been vividly demonstrated by the affirmative involvement of the legislative and executive branches of both

Utah and the United States governments. With respect to the legislative branch of the United States Government, Congress has specifically enacted the Great Salt Lake Lands Act to provide for the current litigation; and with respect to the legislative branch of the Utah Government, the Utah Legislature has specifically consented to the provisions of the federal act and has specifically authorized the present litigation.

The executive branch of the United States Government became directly involved when the Department of Interior reported to Congress an immediate need for the legislation to allow resolution of the title problems (Senate Hearings, *op cit, supra*, page 11), and when President Lyndon B. Johnson, prior to signing the Great Salt Lake Lands Act into law, initiated a discussion with Governor Calvin L. Rampton with respect to the provisions and impact of the bill. Similarly, the executive branch of the Utah State Government became deeply involved when, at the Congressional hearings with respect to the Great Salt Lake Lands Act, Governor Calvin L. Rampton testified to the urgent economic needs of the State which were being seriously hurt by the delay in resolving title uncertainties (Senate Hearings, *op cit, supra*, pp. 14-15), when the Utah Land Board testified to the injurious effect on mineral leasing (Senate Hearings, *op cit, supra*, pp. 45-50), when the Utah Fish and Game Department testified to the injurious impact on valuable waterfowl resources which serve waterfowl feeding and resting needs for large numbers of birds that migrate as far as from Russia to South America (Senate Hearings, *op cit, supra*, pp. 50-60), and when the

Great Salt Lake Authority testified to the injurious impact on its attempt to develop swimming, boating and other recreational facilities along the lake (Senate Hearings, *op cit, supra,* pp. 60-69). Certainly there could be few, if any, parallel examples which would match the instant case as to the injurious mineral, industrial, waterfowl, recreational and related impacts sustained by a state as a result of lack of a forum to litigate. Or, for that matter, it would be difficult to find many examples where both the state and national governments, through both legislative and executive involvement, exerted such strenuous efforts to provide a means for litigation to resolve the controversy.

D. Inclusion of Morton and the other Private Persons Would Create a Complexity Incapable of Adjudication.

The present litigation, if only Utah and the United States are involved, will be reasonably simple and will be capable of an expeditious determination. But to include the private claimants as parties would cause the case to assume such a cumbersome complexity as to make any effective adjudication totally impossible. This is so because many of the private claimants have peculiar legal positions in relation to the claims and defenses which would be asserted against them by the State of Utah but which would not be asserted by the State of Utah against the United States. These claims and defenses would include statute of limitations, laches, estoppel, boundary-line agreements, boundaries by acquiescence, res adjudicata, purchase, and others. In most instances, substantial discovery would have to be done, including the taking of numer-

ous depositions, where no one except Utah and a particular private claimant would be involved.

This is to say that in many instances the claims and defenses between the State of Utah and a single private claimant would assume the proportions of an entire lawsuit, including little in common with any of the other private claimants or with the United States. It is admitted that the position of Morton is less complex than would be the position of many other private claimants, and the issues between Morton and the State of Utah would be simpler than in many other instances between Utah and other private claimants.

But, even with Morton, the trial would not be a simple matter. To illustrate the genuineness of the present claim of complexity, the answer and counterclaim filed by Utah against Morton in Civil No. C-127-66, United States District Court for the District of Utah, is useful. In that pleading there are thirteen defenses and a counterclaim in two counts. Beyond the issues now in this action between Utah and the United States, it would appear that if Utah were required to litigate with Morton and if the same issues were here raised as were raised in the federal district court, this Court would be required to determine general estoppel, estoppel from denying title of landlord, laches, four separate defenses relating to statutes of limitation, and construction of a lease agreement between Utah and Morton. If the litigation progressed, it would certainly get more involved than that, and, as said above, Morton's position is relatively simple compared with many of the approximately 150 private claimants.

Further, if the private claimants were to be included, and if this Court were to limit the adjudication to a "quiet title" action of the land claimed by the United States—and that only—it would be but a piecemeal litigation. There would be no resolution of conflicting claims *between private owners* as to lands claimed by the United States, nor would there be any resolution of ownership in those areas where the United States does not claim title. In other words, to include the private claimants would be to add a fantastic complexity to the present litigation without accomplishing anything near "complete and final" justice, even for the parties before the Courts.

The foregoing discussion, with respect to the complexity and involvement of the litigation if the private claimants were to be included as indispensable parties, is moot in the sense that this Court would not have jurisdiction to proceed to any adjudication if private claimants were to be made parties to this action. But this illustration of complexity, as well as the earlier discussion relating to the great harm to be suffered by everyone unless some relief is afforded in this action, is simply to show particular facts which should be carefully weighed by a court of equity in determining whether the private parties should be termed indispensable.

E. Morton's Right can be Protected in its Absence.

It is true that if any of Morton's property rights were to be impaired or destroyed by this action, in the absence of Morton, then it obviously would be unconstitutional to proceed to that result. But that is not

the case here. Utah in its complaint has prayed only that the Court determine the respective interests between it and the United States. Congress has specifically said that private rights and interests shall not be affected by this action. Surely, any decree or judgment entered by this Court can and must be shaped and drafted so as to incorporate the protective legislative language and to provide specifically that any and all claims of private parties shall be preserved and shall be unaffected by the decree, and that the adjudicated rights of the State of Utah and the United States shall in no way be construed to impair or diminish the claims of private owners.

If the complaint asks nothing of Morton, if Congress says Morton's rights shall not be affected, and if the United States Supreme Court says that Morton's rights are not to be affected—then it is difficult to see how or by whom Morton's rights will be affected.

CONCLUSION

The obvious purport of Rule 19, as demonstrated by its background and content, and by the wealth of case authority discussing indispensable parties, clearly shows that the rule is designed to make final judgments and decrees as meaningful as possible. If vexatious and duplicitous litigation can be avoided, if persons and parties can be protected from double or multiple liability, if litigation can be streamlined so that the most sensible and practical utilization of the courts can be implemented to the benefit of everyone who had ought to be before the court—then the rule serves a substantial purpose.

But the rule ought not to be applied when it would have exactly the reverse impact. A well-known parallel is the application of the statute of frauds, wherein the courts uniformly refuse to apply the statute of frauds in a situation where the result would be, in effect, to work a fraud. This analogy is simply to say that if the court were to find Morton and the other private claimants to be indispensable, the result would be to deprive everyone of any meaningful adjudication, and deprive everyone of having any day in any court on the merits of the controversy.

The present case is highly unusual in a great number of respects, some of which have been set forth under Point V above. But one of the most striking features of the case is that Morton can protect its rights only if it is excluded from this litigation. While at first blush this might seem paradoxical, it is nevertheless true, because if Morton is indispensable then

there can be no litigation, there will be no other forum, and Morton will not be able to establish or adjudicate *any* rights. But, if by initial litigation in this Court between the State of Utah and the United States only, Utah can acquire the federal ownership interest, then subsequent litigation will be possible for Morton and all other private claimants to determine their respective claims against the State of Utah.

Morton is not indispensable and its motion to intervene should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that five (5) copies each of the foregoing Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530, Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D.C. 20006, by mailing the same, air mail postage prepaid, to their respective offices, this 24th day of January, 1968, all in accordance with the Rules of this Court.

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